

ORIGINAL



0000108407

BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

KRISTIN K. MAYES, CHAIRMAN

GARY PIERCE

SANDRA D. KENNEDY

PAUL NEWMAN

BOB STUMP

RECEIVED

2010 MAR 16 P 2:30

AZ CORP COMMISSION  
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION OF  
HUALAPAI VALLEY SOLAR LLC, IN  
CONFORMANCE WITH THE REQUIREMENTS  
OF ARIZONA REVISED STATUTES §§ 40-  
360.03 AND 40-360.06, FOR A CERTIFICATE  
OF ENVIRONMENTAL COMPATIBILITY  
AUTHORIZING CONSTRUCTION OF THE HVS  
PROJECT, A 340 MW PARABOLIC TROUGH  
CONCENTRATING SOLAR THERMAL  
GENERATING FACILITY AND AN  
ASSOCIATED GEN-TIE LINE  
INTERCONNECTING THE GENERATING  
FACILITY TO THE EXISTING MEAD-  
PHOENIX 500kV TRANSMISSION LINE, THE  
MEAD-LIBERTY 345kV TRANSMISSION LINE  
OR THE MOENKOPI-EL DORADO 500kV  
TRANSMISSION LINE.

CASE NO. 151

Docket No. L-00000NN-09-0541-00151

COMMISSION STAFF'S BRIEF ON  
MS. BENSUSAN'S REQUEST FOR  
REVIEW

Arizona Corporation Commission

DOCKETED

MAR 16 2010

DOCKETED BY

*MM*

I. INTRODUCTION.

In order to aide the Commission in its consideration of this matter, Staff hereby files a brief concerning the February 26, 2010 Request for Review by Proposed Intervenor Denise Bensusan and the Applicant's March 10, 2010 Response in the above captioned siting case. Case No. 151 presents a conflict of first impression for the Commission concerning the Committee's refusal to grant intervention in the siting hearings to Ms. Bensusan, an affected local resident and well owner, drawing water from the same aquifer as the proposed site for the project.

Ms. Bensusan's and the Applicant's filings reflect two opposing viewpoints on this conflict. Ms. Bensusan's Request for Review ("Request") states she was wrongly denied intervention. As a result, she asks that the Commission either: (1) deny the application, or in the alternative, (2) grant the application with a stay condition, and reopen the case under A.R.S. § 40-252 to allow for further Commission proceedings with an opportunity for intervention. On the other hand, in its March 10, 2010 Response ("Response"), the Applicant asks that the Commission grant the application without

1 delay. The Response asserts that: (1) Ms. Bensusan lacks standing as a party to bring the  
2 intervention denial before the Commission, and (2) the Commission cannot review the Committee's  
3 failure to grant intervention on the basis it was an abuse of discretion.

4 In Staff's view, the failure to allow Ms. Bensusan to intervene as a party under the  
5 circumstances presented in Siting Case No. 151, substantially impairs the record for purposes of the  
6 Commission's consideration of the application. Contrary to the Applicant's position, the  
7 Commission is not like an appellate court that is limited in its review of the record for error. The  
8 Commission conducts its own balancing in the public interest on siting applications. If the  
9 Commission determines the record is not sufficient to conduct its public interest balancing, the  
10 Commission necessarily must be able to take steps to address the situation.

11 However, instead of denying the application, Staff recommends an expedient "middle of the  
12 road" process to obtain a full record as was discussed by both Ms. Bensusan and the Applicant in  
13 their filings. Therefore, Staff recommends that the Commission grant the application by an order  
14 with a stay condition, and reopen its decision under A.R.S. § 40-252 with an opportunity for  
15 intervenors to be heard as parties. At the conclusion of the A.R.S. § 40-252 proceeding, the  
16 Commission could determine whether to deny or grant the application, and modify its original  
17 decision accordingly. These matters are discussed more fully below.

## 18 **II. BACKGROUND.**

19 The relevant procedural history can be summarized as follows. Hualapai Valley Solar LLC  
20 ("Applicant") filed its application for a Certificate of Environmental Compatibility ("CEC") for a  
21 Solar Thermal Generating Facility and Associated Gen-Tie Line ("Project") on November 23, 2009.  
22 Hearings were scheduled and held on January 12-13, 2010 before the Power Plant and Transmission  
23 Line Siting Committee ("Committee").

24 Ms. Bensusan timely filed for intervention in the Committee proceedings, stating she was a  
25 local resident and had a well that drew from the same aquifer as the Project. On the first day of  
26 hearings, a motion was made to allow Ms. Bensusan's intervention. However, the motion died for  
27 failure to obtain a second, and Ms. Bensusan was denied intervention by the Committee's failure to  
28

1 act. The Committee did not provide reasons for the denial. The Committee also denied the  
2 intervention of another local resident in the same manner. There were no other intervenors. As a  
3 result, the only party to present its case in the record was the Applicant, in spite of the fact that the  
4 two proposed intervenors sought party status to address the most important and controversial issue in  
5 the case, the Project's water usage.

6 On the second day of the hearing, the Committee voted to approve the application for the  
7 Project. However, an Open Meeting Law violation occurred relating to the restrictions imposed  
8 concerning public recording of the Committee's proceedings. A week after the Committee's vote and  
9 before a CEC was docketed, the Applicant filed a request under the Open Meeting Law for  
10 ratification of the Committee's vote to clear any shadow cast on its CEC by the Open Meeting Law  
11 violation. In its ratification request, the Applicant also asked the Committee to reopen the record to  
12 permit intervention of the two local area residents who had been denied intervention on the first day  
13 of the Committee hearings.

14 Pursuant to the Applicant's request, the Committee ratified its vote under the Open Meeting  
15 Law to approve the application. Although the Applicant requested reconsideration of the intervention  
16 of Ms. Bensusan (and the second local area resident) as consistent with Commission practice, the  
17 Committee again denied intervention over the objections of Ms. Bensusan's attorney, Mr. Timothy  
18 Hogan.<sup>1</sup> At the time of reconsideration, comments were made by various Committee members  
19 regarding the Committee's previous failure to act on the intervention requests. However, the  
20 Committee as a whole did not determine or state its reasons for denial for the reconsideration of  
21 intervention.

22 Ms. Bensusan's Request directly addresses intervention issues and quotes extensively from  
23 the record to demonstrate why Ms. Bensusan should have been granted party status as an intervenor.  
24 Ms Bensusan's points are well taken, and statutes and rules cited support Ms. Bensusan intervention  
25 in the Committee's proceedings. Although the Applicant filed a response to Ms. Bensusan's request,  
26

---

27 <sup>1</sup> Neither of the two individuals seeking intervention was represented by an attorney at the January  
28 12-13 hearings. Mr. Hogan's first appearance on Ms. Bensusan's behalf was at the January 27,  
2010 proceedings.

1 the response fails to demonstrate that: (1) denial of Ms. Bensusan's intervention is supported by the  
2 facts of this case, and (2) the Commission has a complete evidentiary record upon which to conduct  
3 its review.

4 **III. THE FAILURE TO PERMIT AFFECTED INDIVIDUALS LIKE MS. BENSUSAN TO**  
5 **INTERVENE IN SITING MATTERS IS INCONSISTENT WITH THE STATUTORY**  
6 **SITING SCHEME.**

7 The siting statutory scheme is set up to provide interested and affected entities and individuals  
8 an opportunity to meaningfully participate through intervention in siting of projects. The Line Siting  
9 statutes were added by Laws 1971, Ch. 67. Laws 1971, Ch. 67, § 1 states:

10 [T]he legislature finds that existing law does not provide adequate  
11 **opportunity for individuals**, groups interested in conservation and  
12 the protection of the environment, local governments, and other public  
13 bodies **to participate** in timely fashion in the decision to locate a  
14 specific major facility at a specific site. The legislature therefore,  
15 declares that it is the purpose of this article to provide a single forum  
16 for the expeditious resolution of all matters concerning the location of  
17 electric generating plants and transmission lines in a single proceeding  
18 to which **access will be open to interested and affected individuals**,  
19 groups, county and municipal governments and other public bodies **to**  
20 **enable them to participate in these decisions.** (emphasis added).

21 Ms. Bensusan asserted that she was a local resident affected by the Project, including the  
22 Project's water usage which would draw down water from the same aquifer as her own well. No  
23 other party to the proceeding stood in her position and no other party could represent her interests.  
24 Although Committee members commented that allowing Ms. Bensusan to intervene could open the  
25 floodgates to 800 other well owners drawing from the same aquifer, those are not the facts of this  
26 case. Only two individuals sought intervention in this matter. Moreover, the siting statutory  
27 provisions provide a tool to prevent a possible flood of nongovernmental intervenors. If the  
28 Committee so chooses, nongovernmental parties with similar interests may be required to consolidate  
their representation. See A.R.S. § 40-360.04(C).

The failure to grant intervention under these circumstances is not consistent with the siting  
statutory scheme or with the Commission's practice to open its proceedings to full participation by  
interested entities and individuals who may be adversely impacted by an application. As stated by

1 Ms. Bensusan, her elimination as a party in the siting hearings defeats the meaning of the process.  
2 Hrg. Tr. at 13.

3 **IV. STANDARD FOR DETERMINING INTERVENTION.**

4 Committee members commented and the Applicant's Response implies that the Committee  
5 has unfettered discretion to determine the appropriateness of the intervention of nongovernmental  
6 individuals, citing A.R.S. § 40-360.05(A)(4). Their reliance on the statute is misplaced. Neither  
7 A.R.S. § 40-360.05(A)(4) nor any Committee rule provides a standard for determining the  
8 "appropriateness" of interventions. However, Line Siting Rule R14-3-216 states that Rules of Civil  
9 Procedure apply in the absence of a Committee rule.

10 Civil Procedure Rule 24 sets out conditions under which intervention is granted either by right  
11 or by permission. Permissive intervention is granted under discretion of the court. Even assuming  
12 for purposes of argument that Ms. Bensusan did not have a Rule 24 right to intervene under the  
13 statutory siting scheme, denial of permissive intervention requires a far greater showing in the record  
14 than denial by lack of a second on a motion, or after the fact comments by Committee members on  
15 reconsideration. Ms. Bensusan was entitled to have the Committee as a whole vote on her  
16 intervention, and determine and state the relevant factors upon which the Committee as a whole  
17 based its denial. Denial coupled with failure to address the relevant factors in making the decision is  
18 an abuse of discretion since lack of information as to reasoning makes it difficult to "indulge the  
19 discretion of the . . . court."<sup>2</sup>

20 Staff believes that the Committee members' focus on the sufficiency of the Applicant's case  
21 to create a record for their future deliberations put the issue raised herein backwards. The real issue  
22 on intervention is whether Ms. Bensusan's rights to be heard as a party were appropriately protected,  
23 considered and ruled upon. *Allen v. Chon-Lopez*, 214 Ariz. 361, 364, 153 P.3d 382, 386 (2007) (It  
24 was improper of respondent judge to deny intervention on basis the appellant may not ultimately  
25 succeed on the outcome, rather than permitting her the right to litigate that issue as a party).

---

26  
27 <sup>2</sup> *Allen v. Chon-Lopez, et al.*, 214 Ariz. 361, 153 P.3d 382 (App. 2007), citing *Bechtel v. Rose*, 150  
28 Ariz. 68, 722 P.2d 236 (1986) and *William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385, 389, 965  
P.2d 1224, 1228 (App.1998); see also Reconsideration Hrg. Tr. at 20:19-20.

1        There were also expressed concerns that Ms. Bensusan was not an attorney. Representation  
2 by an attorney is not a requirement or a standard for determination of the right to intervene either  
3 under the siting statutes or Commission practice. Ms. Bensusan agreed to follow all the procedures  
4 required by the Committee of a party, even though she was not an attorney. Prehr. Tr. at 16.

5 **V.     MS. BENSUSAN WAS NOT AFFORDED DUE PROCESS.**

6        Because Ms. Bensusan was denied intervention, she was denied party status in the  
7 proceedings before the Committee and the substantive rights attendant to party status. Over her  
8 explicit objection, Ms. Bensusan was not allowed to cross examine witnesses, call her own witnesses  
9 and to present her case in the record on her issues, including water usage for the Project, the core  
10 issue in the proceedings. Hrg. Tr. at 16. However, she was sworn in to testify. In light of the facts of  
11 this case, by placing Ms. Bensusan under oath to provide testimony without giving her the right to  
12 cross examine witnesses or present her own witnesses, effectively placed Ms. Bensusan in the  
13 position of having had the obligations without the benefits of a party.

14        As a substitute for Ms. Bensusan's loss of party status, Applicant's Response refers to  
15 questions the Committee in its discretion, chose to ask various witnesses. These references are held  
16 out in the Response as establishing that Ms. Bensusan's issues were accommodated, and that her own  
17 cross examination of the witnesses was unnecessary to protect her interests in the record. However,  
18 just the opposite is demonstrated by the record. Applicant's direct case came before Ms. Bensusan  
19 was placed under oath and testified. Thus, the Committee did not have her testimony for use in its  
20 discretionary questions to the Applicant's witnesses. Even assuming for purposes of argument that  
21 the Committee's limited questions on the Applicant's rebuttal addressed some points raised in Ms.  
22 Bensusan's testimony, the Applicant's Response fails to show how Committee-selected questions  
23 were an adequate substitute for Ms. Bensusan's own cross examination of witnesses and the  
24 presentation of her own witnesses.<sup>3</sup>

25  
26  
27 <sup>3</sup> Although it appears from the transcript that Ms. Bensusan provided written questions to the  
28 Committee for Committee members to select and ask, it does not appear that the Committee entered  
Ms. Bensusan's questions as an exhibit in the record.

1 Another point should be made about Applicant's Response on Ms. Bensusan's alleged lack of  
2 standing as a party because she was not permitted to be an intervenor.<sup>4</sup> It is now asserted by  
3 Applicant that because Ms. Bensusan was not a party, she is denied the right to seek review of the  
4 Committee's proceedings, and file a request for review. Taken to its logical conclusion, if the  
5 Committee denies intervention for whatever reason or no reason, an individual would be foreclosed  
6 forever from seeking consideration by the Commission. This viewpoint would not only deny rejected  
7 intervenors from stating their cases, in effect it would impermissibly limit the Commission from  
8 ensuring it had a complete and full record upon which to balance the public interest. Moreover,  
9 under Applicant's reasoning, Ms. Bensusan is also precluded from seeking judicial review of the  
10 Commission's final decision.

11 **VI. THE RECORD IS ONE-SIDED AND INCOMPLETE FOR PURPOSES OF**  
12 **COMMISSION CONSIDERATION.**

13 In this instance the evidentiary record is incomplete. Only the Applicant was permitted to  
14 present its case for the record. The proposed intervenors were excluded from participating as parties  
15 concerning the central conflict on the merits of the application, the Project's water usage. See Hr. Tr.  
16 at 174, 397.

17 The unevenness of the process extended to public comment as well. During public comment,  
18 only local officials who supported the Application without reservation were sworn in by the  
19 Committee to provide testimony in the evidentiary record. In contrast, those members of the public  
20 and a local official who either opposed the Project or expressed reservations were not sworn in by the  
21  
22

---

23 <sup>4</sup> Denial of intervention is open to appeal. As stated in *California Trout v. FERC*, 572 F.3d 1003,  
24 1013 at FN 7 (9th Cir. 2009):

25 There is an equitable exemption to this rule for petitioners challenging  
26 the Commission's denial of party status, because "[i]t would be grossly  
27 unfair to deny judicial review to a petitioner objecting to an agency's  
28 refusal to grant party status on the basis that the petitioner lacks party  
status." . . . In such cases, the petitioner is "considered a party for the  
limited purpose of reviewing the agency's basis for denying party  
status."

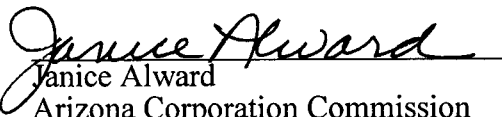
1 Committee. Thus, their public comments in opposition to the proposed water usage for the Project  
2 are not testimony in the evidentiary record.

3 **VII. RECOMMENDATION.**

4 The siting statutory scheme does not expressly provide for a remand back to the Committee  
5 when the Commission determines that the evidentiary record is insufficient for purposes of  
6 Commission consideration. However, the Commission may address the insufficient record problem  
7 in other ways. One way is to deny the application, which would require a new filing by the Applicant  
8 to start the process over again. Another way to correct an insufficient record is for the Commission  
9 to approve the application on a conditional basis and stay the decision in order to conduct an A.R.S. §  
10 40-252 proceeding. A.R.S. § 40 -252 allows the Commission to reopen a case (with notice and  
11 opportunity to be heard for the parties) and reach a new or altered decision. As result of the A.R.S. §  
12 40-252 proceeding, the Commission could change its conditional approval of the application, and  
13 instead approve, deny or modify its original order.

14 Staff recommends an A.R.S. § 40-252 proceeding to reopen this case as an expedient way to  
15 provide the Commission with a full record upon which to conduct its mandatory statutory balancing.  
16 The stay condition should include language to reopen the case under A.R.S. § 40-252 and provide for  
17 notice and opportunity to be heard by the Applicant and other parties who seek and are granted  
18 intervention in the Commission proceedings.

19 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March, 2010.  
20

21   
22 Janice Alward  
23 Arizona Corporation Commission  
24 Legal Division  
25 1200 West Washington Street  
26 Phoenix, Arizona 85007  
27 (602) 542-3402  
28



1 Original and twenty-eight (28)  
2 copies of the foregoing filed this  
3 16<sup>th</sup> day of March, 2010 with:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 West Washington Street  
7 Phoenix, Arizona 85007

8 Copies of the foregoing  
9 mailed this 16<sup>th</sup> day of  
10 March, 2010 to:

11 Thomas H. Campbell  
12 Albert H. Acken  
13 LEWIS & ROCA, LLP  
14 Two Renaissance Square  
15 40 North Central Avenue  
16 Phoenix, Arizona 85004  
17 Attorneys for Hualapai Valley Solar, LLC

18 Susan A. Moore-Bayer  
19 7656 West Abrigo Drive  
20 Golden Valley, Arizona 86413

21 Denise Herring-Bensusan  
22 c/o Crazy Horse Country Store  
23 8746 North Stockton Hill Road  
24 Kingman, Arizona 86409

25 Israel G. Torres  
26 Torres Consulting and Law Group, LLC  
27 209 East Baseline Road, Suite E-102  
28 Tempe, Arizona 85283

By Roseann Osorio